

IN THE UNITED STATES DISTRICT COURT FILED
BILLINGS DIV.

FOR THE DISTRICT OF MONTANA 2009 APR 27 PM 2 09

BILLINGS DIVISION

PATRICK E. DUFFY, CLERK
BY _____
DEPUTY CLERK

CLIFFORD W. EAGLE,)	
)	CV-09-18-BLG-RFC
Petitioner,)	
vs.)	
)	ORDER ADOPTING FINDINGS
STATE OF MONTANA,)	AND RECOMMENDATIONS OF
)	U.S. MAGISTRATE JUDGE
Respondent.)	
_____)	

On February 19, 2009, United States Magistrate Judge Carolyn Ostby entered Findings and Recommendation (*Doc. 3*) with respect to Eagle's 28 U.S.C. § 2241 petition for writ of habeas corpus. Magistrate Judge Ostby recommends that the petition be dismissed for lack of jurisdiction.

Upon service of a magistrate judge's findings and recommendation, a party has 10 days to file written objections. 28 U.S.C. § 636(b)(1). In this matter, Petitioner filed an objection on March 3, 2009. Petitioner also filed a Motion for Leave to Proceed in Forma Pauperis and a Motion to Correct Respondent on February 26, 2009. Petitioner's objections require this Court to make a *de novo* determination of those portions of the Findings and Recommendations to which

objection is made. 28 U.S.C. § 636(b)(1). Petitioner's objections are not well taken.

After a de novo review, the Court determines the Findings and Recommendation of Magistrate Judge Ostby are well grounded in law and fact and **HEREBY ORDERS** they be adopted in their entirety.

Eagle's petition under § 2241 should be dismissed because § 2241 is not an appropriate remedy. There is no reason to convert the petition to a motion under 28 U.S.C. § 2255 because Eagle's criminal case is pending on appeal before the Ninth Circuit.

The Court will not consider whether a certificate of appealability should issue because a COA is not required for petitions filed under 28 U.S.C. § 2241 where, as here, the detention complained of arises out of process issued by a federal court. 28 U.S.C. § 2253(c)(1)(A), (B). It is appropriate to certify that any appeal would not be taken in good faith because it is well-settled that Eagle may not proceed under § 2241 and may not file a § 2255 motion while a direct appeal is pending.

Accordingly, **IT IS HEREBY ORDERED** that the Petition (*Doc. 1*) is **DISMISSED** for lack of jurisdiction. Further, this Court Certifies, pursuant to

F.R.App.P. 24(a)(4)(B) that any appeal from its disposition would not be taken in good faith.

Because the Petition is dismissed for lack of jurisdiction, the Clerk of Court is directed to terminate Petitioner's Motion for Leave to Proceed in Forma Pauperis (*Doc. 4*) and a Motion to Correct Respondent (*Doc. 5*) as both motions are **MOOT**.

The Clerk of Court shall enter by separate document a judgment of dismissal, notify the parties of the making of this Order, and close this case accordingly.

DATED this 27th day of April, 2009.


RICHARD F. CEBULL
UNITED STATES DISTRICT JUDGE